No. 83-1816

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM JIBSON,

Appellant,

v.

WHITE CLOUD EDUCATION ASSOCIATION,

Appellee.

On Appeal From the Court of Appeals of Michigan

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

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Pursuant to Rule 16.5 of the Rules of this Court, appellant William Jibson hereby opposes appellee's motion to dismiss this appeal.

ARGUMENT

Appellee White Cloud Education Association ("the Union") says little on the merits in its motion to dismiss. Instead, it attempts to confuse the question this appeal presents by distorting the record, asserting misleading irrelevancies, and ignoring what the lower courts actually did in this case.

The Union's primary argument is that this case presents

no substantial federal question because, it says, Mr. Jibson's "offer to pay an agency fee into escrow was conditioned on the union disavowing its own objection procedure and instead commencing a lawsuit for the purpose of proving what portion of the contractual agency fee Mr. Jibson could be required to pay." Motion to Dismiss at 3-4. This assertion is irrelevant and misleading, as the record demonstrates.

To begin with, Mr. Jibson's escrow offer was not conditioned upon the Union's filing of a separate lawsuit to prove its constitutionally chargeable costs. Both the final order of the Newaygo County Circuit Court and the decision of the Michigan Court of Appeals describe Mr. Jibson as "offering * * * to pay [the contested fee] into an escrow account pending *the circuit court's* determination of the amount thereof not used for ideological activities Jibson did not choose to support." App. A at 7a (emphasis added); *accord* App. B at 19a.[1] That determination would have been made in *this* action, which was already pending between the parties.

Moreover, the Union's internal "agency fee objection procedure" appears nowhere in the record in this case and was not even mentioned in the decisions below. It simply was not at issue. Both the trial court and the court of appeals assumed that, under *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), Mr. Jibson was entitled to a *judicial* determination of the amount of the fee that could be collected from him, but ruled that he had to pay the full disputed fee to the Union as a prerequisite to seeking such a

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[1] Appendix ("App.") references are to the appendices to the jurisdictional statement.

determination. *See* App. A at 6a-8a; App. B at 19a. As the jurisdictional statement shows, the validity of that ruling is a substantial federal constitutional question which has been foreclosed against the Union by *Ellis v. Railway Clerks*, 104 S. Ct. 1883, 1889-90 (1984).

This conclusion obtains notwithstanding that the disputed fee which Mr. Jibson was required to pay to the Union was not equal to full union dues, but was a reduced amount based upon the Union's own calculation of the proportion of a dues-equivalent fee which "would be spent on political or ideological activities unrelated to collective bargaining." Motion to Dismiss at 6. For the reduction was neither a matter of record in the trial court nor a basis for the decision of the court of appeals from which this appeal is brought. *See* App. A at 1a-2a, 6a-8a; App. B at 11a-12a, 16a-17a, 19a. Indeed, even in *Kempner v. Local 2077, State, County & Municipal Employees*, 126 Mich. App. 452, 455, 337 N.W.2d 354, 356 (1983), *appeal denied*, No. 72287 (Mich. Jun. 8, 1984), in which a union-determined reduction was a matter of record, the court of appeals did not consider it relevant to the escrow issue. Instead, the court "adopt[ed] the conclusion of *White Cloud*, that escrow accounts are *not* permitted, as more fully reflective of the United States Supreme Court's decision in *Abood*." 126 Mich. App. at 459-60, 337 N.W.2d at 357-58 (citation omitted). In short, in this case the Michigan Court of Appeals construed that state's agency-shop statute to require the payment of fees equal to full union dues as a prerequisite to litigating the constitutionality of their amount.

Even were the Union's unilateral reduction a matter of

record, the lower courts' application of the statute is still "the pure rebate approach" condemned in *Ellis*. According to the Union, a fee equal to dues would have been $240.00. Brief of Plaintiff-Appellee at 25, No. 45898 (Mich. Ct. App., filed Nov. 7, 1979). The amount which the trial court ordered Mr. Jibson to pay to the Union was $231.20. App. B at 19a. The reduction by $8.80 was an admission by the Union that it would have used at least 3.7% of Mr. Jibson's money for impermissible purposes had he not refused to pay a fee equal to dues. But the chargeability of the remaining 96.3% is still disputed and must be adjudicated. Under the decisions below, however, the Union has the use of the contested funds in the interim, and the employee's only remedy is a refund. Like the payment of interest discussed in *Ellis*, the Union's concession reduces the harm; but "[e]ven then the union obtains an involuntary loan for purposes to which the employee objects." 104 S. Ct. at 1980.[2]

In discussing the validity of the rebate approach in *Ellis*, the Court cited *School Committee v. Greenfield Education Association*, 385 Mass. 70, 431 N.E.2d 180 (1982), and *Robinson v. New Jersey*, 547 F. Supp. 1297 (D.N.J. 1982), as examples of cases "holding or suggesting that such a

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[2] The term of the involuntary loan is even longer under the scheme adopted by the Michigan Employment Relations Commission ("MERC") in *Kempner* than it is under that applied by the lower courts in this case. In *Kempner* MERC ruled that a union can make an advance reduction "'us[ing] its own definition of ideological or political purpose,'" and then an objecting employee must pay the reduced fee and "'exhaust the internal appeal procedures provided by [the Union] for challenging its allocation of the fee before requesting allocation from the Commission'." 126 Mich. App. at 456, 461, 337 N.W.2d at 356, 359. Thus, "a remand of the present case for consideration * * * of the Michigan Education Association's intervening adoption of the *Kempner* reduced fee approach," suggested by the Union, Motion to Dismiss at 10, would accomplish no purpose.

scheme does not adequately protect the rights of dissenting employees." 104 S. Ct. at 1890 n.7. In both cases, as here, the fee demanded by the union was equal to union dues minus a union-determined amount. In *Greenfield*, membership dues were $158, the service fee $153 (a 3.2% reduction); the union admitted that a portion of the fee would nonetheless be used for impermissible purposes. 385 Mass. at 73, 78, 431 N.E.2d at 183, 185.

In *Robinson*, 547 F. Supp. at 1305, 1309, the unions reduced the compulsory fees to a statutorily mandated 85% of dues, and then urged that this limitation adequately protected the rights of dissenting employees. The district court rejected this argument for reasons which apply here as well:

> There might be some merit in this contention if only expenses of the local bargaining representative were involved and if, in advance of the collection of the representation fee, there was available a detailed budget showing receipts and expenditures of the local organization. That is not the case here, however. * * * In the education association situation there are relatively modest local and county associations functioning under the umbrella of large and powerful state and national organizations. To assume that membership-only expenses and political, ideological and lobbying expenses of each of those organizations total 15% or less of pertinent total expenses requires an exercise of faith which should not be required of [non-members].

Id. at 1319.[3]

The "advance reduction of dues" to which this Court referred in *Ellis*, 104 S. Ct. at 1890, as an "acceptable alternative" to the rebate approach, was not a sham union-determined reduction. Rather, it was the "more precise advance reduction scheme" first suggested by the Court in *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963), "where [the Court] described *a 'practical decree' comprising* a refund of exacted funds in the proportion that union political expenditures bore to total union expenditures and *the reduction of future exactions by the same proportion.*" *Ellis*, 104 S. Ct. at 1889-90 (emphasis added). Unlike a reduction computed by the wrong-doer, an advance reduction determined by a court or other state tribunal is "a way of preventing compulsory subsidization of ideological activity by employees who object thereto," *Abood*, 431 U.S. at 237, that accords with due process. *See Robinson v. New Jersey*, 565 F. Supp. 942 (D.N.J. 1983).

The Union complains that it is unduly burdensome for it to have to prove the amount to which it is entitled before collecting the fee. The Court rejected this argument of "administrative convenience" in *Ellis*, 104 S. Ct. at 1890. "[A]dministrative convenience alone is insufficient to make

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[3] In this case, it is even more certain than in *Robinson* that the Union's voluntary reduction allows it to "borrow" employee funds for improper uses. The Union's agency-fee objection scheme defines "[a]n ideological cause or political activity" for which the Union makes a reduction as "one which is unrelated to *organizing*, collective bargaining, contract administration, grievance adjustment *or employee representation.*" Motion to Dismiss, Appendix A at 2a (emphasis added). Thus, the Union's criteria for a reduction on their face are narrower than *Abood* and *Ellis* require.

valid what otherwise is a violation of [individual constitutional rights]." *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 646-47 (1974). Moreover, escrow "place[s] only the slightest additional burden, if any, on the union." *Ellis*, 104 S. Ct. 1890. The Union has to litigate the fee in any case, either in this suit while the fee is escrowed, or in one subsequently brought by Mr. Jibson to obtain a refund of monies spent in violation of his first-amendment rights. *Ellis* has established that the latter approach is not an adequate alternative.[4]

The Union also half-heartedly argues that the question presented by this appeal was not properly raised below, saying that Mr. Jibson's "escrow proposal was belatedly raised and not even briefed in the trial court by either Appellant or Appellee." Motion to Dismiss at 11. "Belatedly" or not, the escrow issue was properly raised and determined in the trial court. It was asserted in Mr. Jibson's answer, and the circuit court granted his motion to intervene. Answer of Intervenor at 2 (filed May 25, 1979); App. B at 19a. The issue was orally argued when the circuit court heard the Board of Education's motion for a new trial, and that court explicitly decided the question. App. B at 18a-19a. More importantly, the escrow issue was briefed by both sides in the Michigan Court of Appeals, and the latter

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[4] While the question is not presented by this appeal, the Union's suggestion that a proceeding involving a single employee could determine what fee is constitutionally chargeable to objecting employees in different bargaining units is erroneous. The fee must be independently determined for each unit, since objecting employees may only be charged for "the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union *as exclusive representative of the employees in the bargaining unit*." *Ellis*, 104 S. Ct. at 1892 (emphasis added); *see Abood*, 431 U.S. at 231-32, 234-35.

court squarely ruled upon it in the decision from which this appeal is brought. Brief of Intervenor Defendant-Appellant William Jibson at 29-33 (filed Sept. 4, 1979); Brief of Plaintiff-Appellee at 23-31 (filed Nov. 7, 1979); App. A at 6a-8a.

CONCLUSION

Appellee's motion to dismiss is meritless. This Court should summarily reverse the decision below and grant the further relief requested in the jurisdictional statement (at 18) or, in the alternative, note probable jurisdiction and set this cause down for plenary briefing and argument.

Respectfully submitted,

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